

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-214331

DATE: August 20, 1984

MATTER OF: Carrier Corporation

DIGEST:

1. Where protester is aware that solicitation has been canceled but does not know why until it receives information requested under the Freedom of Information Act, protest founded upon information received under Freedom of Information Act, filed within 10 working days of receipt of the information, is timely.
2. Where agency determines that work covered by the solicitation can be accomplished in-house at a substantial cost savings to the government, the agency may cancel solicitation on the ground that the cancellation is in the best interest of the government.
3. An issuing agency properly may cancel a solicitation after bid opening regardless of when information justifying cancellation first surfaces.

Carrier Corporation (Carrier) protests the General Services Administration (GSA) cancellation of invitation for bids (IFB) GS-05B-42433 after bid opening for a 3-year mechanical maintenance service contract for the Federal Building and United States Courthouse, St. Paul, Minnesota. The services currently are being performed in-house by government employees. The IFB was issued to contract out for the services under the authority contained in the supplement to the Office of Management and Budget Circular (OMB) A-76 (August 1983), which permits an agency to convert to a contract commercial activities being performed by 10 or fewer government employees without performing a cost comparison.

We deny the protest.

A threshold matter raised by GSA concerns the timeliness of Carrier's protest. GSA contends that Carrier's protest is untimely because it was not filed with this Office within 10 working days of that firm's receipt of GSA's January 4 letter advising that the IFB had been

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cancelled due to changed requirements. In this regard, our Bid Protest Procedures require that a protest be filed within 10 working days of the date on which the protester knew of its basis for protest. 4 C.F.R. § 21.2(b)(2) (1984).

Carrier explains that, upon receipt of GSA's January 4 letter, the firm immediately (on January 5) filed a Freedom of Information Act (FOIA) request with GSA seeking the reasons for the cancellation. The information received by Carrier on January 25 indicated that the IFB was not canceled due to "changed requirements," but because GSA lacked authority to involuntarily separate those government employees currently providing the services. On February 8, Carrier filed its protest with this Office arguing that lack of authority to involuntarily separate the employees was not a compelling reason to cancel the IFB.

We find that Carrier's protest is timely. We will consider a protest based entirely on information obtained under the FOIA to be timely so long as the protest is filed within 10 working days of the protester's receipt of information upon which its protest is founded and the protester diligently pursued the release of information under FOIA. J.C. Yamas Company, B-211105, Dec. 7, 1983, 83-2 C.P.D. ¶ 653; Tracor Jitco, Inc., B-208476, Jan. 31, 1983, 83-1 C.P.D. ¶ 98. Here, Carrier did not know its basis for protest, that is, the actual reason for the cancellation of the IFB until it received the FOIA materials. GSA does not dispute this. Since Carrier filed its FOIA request with GSA promptly after receiving GSA's cancellation letter and filed its initial protest with our Office within 10 working days of receiving the FOIA materials on which its protest is founded, we consider the firm's protest to be timely and will consider it on the merits. Tracor Jitco, Inc., B-208476, supra.

In its report to this Office, GSA explains that the IFB was canceled based upon erroneous information that GSA lacked the authority to involuntarily separate the government employees providing the services. However, after bid opening, the agency also reviewed the requirement and determined that the services covered by the IFB could be accomplished by in-house personnel at a savings to the government of approximately \$115,440, or \$38,480 per year, for the 3-year contract period. GSA thus decided not to reinstate the IFB and, in the future, to issue the IFB for

the services as part of a cost comparison conducted under the rules set forth in OMB circular A-76 to determine whether the services should be performed in-house or contracted out.

Carrier, the low bidder, contends that the small cost savings to the government by having in-house personnel provide the services is not a compelling reason to compromise the integrity of the competitive bidding system by canceling the IFB after all bids have been exposed. In this respect, Carrier points out that its bid price is reasonably close to the government's contract price estimate. Carrier also argues that GSA, after canceling the IFB for erroneous reasons, may not justify the cancellation on another basis and that lack of authority to involuntarily separate employees was not a proper reason to cancel the IFB in any event.

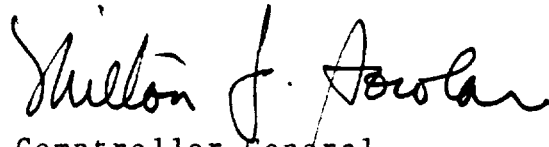
Generally, we do not review an agency decision to perform work in-house rather than to contract for the services because we regard the decision as a matter of policy within the province of the executive branch. D-K Associates, Inc., B-206196, Jan. 18, 1983, 83-1 C.P.D. ¶ 55. However, where, as here, a competitive solicitation has been issued to contract for the services, the challenge to the cancellation of the solicitation is appropriate for our review under the general rules applicable to cancellation after bid opening since the competitive bid system is involved. D-K Associates, Inc., B-206196, supra.

The general rule regarding cancellation after bid opening and the exposure of bids is that such cancellation is not proper unless it is warranted by a cogent and compelling reason. D-K Associates, Inc., B-206196, supra; Chrysler Corporation, B-206943, Sept. 24, 1982, 82-2 C.P.D. ¶ 271. However, we have recognized that the determination of whether a sufficiently compelling reason for the cancellation exists is primarily within the discretion of the administrative agency and will not be disturbed absent proof that the decision was clearly arbitrary, capricious or not supported by substantial evidence. Moreover, we have held that, in determining whether such a reason exists, one of the factors which must be considered is whether the best interest of the government would be served by making award under the solicitation. Chrysler Corporation, B-206943, supra. In this regard, we have explained that, when it is determined that

the services covered by the IFB could be performed by in-house personnel at a cost savings to the government compared to the cost to the government to contract for the services, the best interest of the government requires cancellation. See Bush-Herrick, Inc., B-209683, June 20, 1983, 83-1 C.P.D. ¶ 669; Chrysler Corporation, B-206943, supra; C. Joe Fuller, B-186479, Oct. 20, 1976, 76-2 C.P.D. ¶ 349.

Here, GSA determined that it could save approximately \$115,440 (almost 25 percent of GSA's estimate of the cost of performing by contract) by having in-house personnel perform the services. In this regard, the IFB warned bidders that the government reserves the right to reject all bids (when it is in the best interest of the government to do so). Based upon this, we cannot conclude that the cancellation was improper.

Furthermore, while Carrier asserts that GSA may not use the cost savings to the government as a basis to justify the initial cancellation for erroneous reasons, we have held that an agency may properly determine to cancel a solicitation after bid opening no matter when the information precipitating the cancellation first surfaces. Chrysler Corporation, B-206943, supra. Therefore, GSA could properly determine during its post-bid-opening review that cancellation was warranted based upon the above grounds even after learning that its initial grounds for cancellation were erroneous.



Acting Comptroller General
of the United States